

IN THE COURT OF APPEALS OF IOWA

No. 0-238 / 09-0857
Filed October 20, 2010

HERALD FRIEDLEY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Herald Friedley appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Peter M. Parry of Forker & Parry, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee State.

Considered by Sackett, C.J., and Vogel and Danilson, JJ. Tabor, J. takes no part.

SACKETT, C.J.

Herald Friedley appeals from the denial of his application for postconviction relief. He contends the court erred in ruling (1) the trial judge need not have recused himself, (2) the trial judge properly submitted an instruction on aiding and abetting, and (3) trial counsel was not ineffective. We affirm.

I. Background Facts and Proceedings

The facts relevant to this appeal were summarized on direct appeal as follows:

Defendant Herald Friedley (Friedley) and his son Randy (Randy) were engaged in the auto sales business in Cedar Falls for many years, eventually operating Friedley Saab, Inc. Friedley Saab financed its new car inventory with a line of credit at the Citizens Bank & Trust Co. Citizens Bank secured its advances on Friedley Saab's credit line by taking a security interest in Friedley Saab's new car inventory. The terms of Friedley Saab's credit and security agreement required Friedley Saab to apply the proceeds of each car sold to the amount advanced to purchase the particular car sold.

In December 1997 Friedley Saab's revenue was not sufficient to meet its operating expenses. As a result, new car sales proceeds were first applied to Friedley Saab's taxes and payroll expenses rather than to its debt secured by the bank's interest in those proceeds. In January 1998 Citizens Bank loan officer, James Chizek, visited Friedley Saab's dealership to audit its compliance with the terms of the security agreement. A number of the vehicles subject to Citizens Bank's security interest were missing. Randy Friedley assured Chizek that Friedley Saab's performance on its notes with Citizens Bank would improve the following month. Randy, however, did not tell Chizek the missing cars had been sold. When Chizek returned in February 1998, sixteen cars covered by the parties' security agreement could not be accounted for.

Randy told Chizek the cars were being test driven when, in fact, they had been sold. When Chizek later met with Herald Friedley, Friedley admitted the cars and the money were "gone." As a result, Citizens Bank cancelled Friedley Saab's line of credit

and declared the unpaid balance of their notes due and payable. Friedley was subsequently charged with one count of ongoing criminal conduct, in violation of Iowa Code section 706A.2 (1997), six counts of first-degree theft, in violation of sections 714.1 and 714.2(1), and two counts of second-degree theft, in violation of sections 714.1 and 714.2(2). The State's theory was there was a theft of sales proceeds in which Citizens Bank held a security interest in violation of section 714.1(5) (a person "[t]akes, destroys, conceals or disposes of property in which someone else has a security interest, with the intent to defraud the secured party"). A jury found Friedley guilty of the crimes charged.

State v. Friedley, No. 01-1455 (Iowa Ct. App. July 10, 2003).

Friedley appealed his convictions on several grounds, including that his attorney failed to provide competent advice to allow him to make a knowing and intelligent waiver of his right to testify and that the district court erred by interjecting the theory of aiding and abetting into the case on its own motion, thus assuming the role of a prosecutor. *Id.* This court preserved the ineffective-assistance claim for postconviction relief and deemed the aiding-and-abetting claim waived because he cited no authority to support it. *Id.*

In September of 2006, Friedley filed an application for postconviction relief. The State filed a motion to dismiss Friedley's application for postconviction relief, alleging Friedley raised the same claims that had already been raised and decided on direct appeal. The postconviction court determined many of the issues raised were waived, but that it would consider (1) trial counsel's ineffectiveness in failing to allow him to testify at trial, (2) appellate counsel's ineffective assistance in failing to raise the issue of the trial judge's recusal, (3) trial counsel's ineffectiveness in failing to defend or request a continuance concerning the State's theory of aiding and abetting a corporation, and (4) trial

counsel's ineffectiveness in failing to locate and call James Swarbrick Jr. as a witness. Following the court's order on which issues would be considered, Friedley filed a supplemental application for postconviction relief. He alleged trial counsel was ineffective in (1) not adequately advising him on the exercise of his right to testify, (2) not making an adequate record concerning the trial court's conduct and bias, (3) not preparing to defend against an aiding-and-abetting claim, (4) not moving to sever, and (5) not adequately explaining available options concerning a plea agreement offer. He also claimed judicial misconduct, newly-discovered evidence, and an illegal sentence.

After a hearing, the postconviction court denied Friedley's application for postconviction relief in its entirety. It noted there "appear[ed]" to be four issues presented: (1) whether the trial judge should have recused himself, (2) whether the trial judge acted inappropriately in instructing the jury on aiding and abetting, (3) whether trial counsel was ineffective in not allowing Friedley to testify, and (4) whether trial counsel was ineffective in not calling "certain witnesses to bolster" Friedley's position. On appeal, Friedley contends the postconviction court erred in ruling (1) the trial judge need not have recused himself, (2) it was proper for the trial court to submit an aiding-and-abetting instruction, and (3) trial counsel was not ineffective in advising him regarding his right to testify or in not calling James Swarbrick as a witness.

II. Scope and Standards of Review.

Generally, postconviction relief proceedings are reviewed for correction of errors at law. *Holm v. Iowa Dist. Ct.*, 767 N.W.2d 409, 414 (Iowa 2009).

However, claims alleging violation of constitutional rights, such as claims of ineffective assistance of counsel, are reviewed “in light of the totality of the circumstances and the record upon which the postconviction court’s ruling was made.” *Id.* “This is the functional equivalent of de novo review.” *Id.*

III. Merits.

A. *Recusal.* Friedley contends the postconviction court erred in ruling the trial judge need not have recused himself at trial. The State contends this issue is not preserved for our review. Friedley’s recusal argument is not raised in an ineffective-assistance context, but rather as a claim that the postconviction court erred in finding the trial judge had no reason to recuse himself. This claim was not raised in the direct appeal, so only can be raised as an ineffective-assistance claim in a postconviction action. See *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999) (“We have long adhered to the general principle that postconviction relief proceedings are not an alternative means for litigating issues that were or should have been properly presented for review on direct appeal.”). However improper, the postconviction court considered the merits of the underlying recusal claim, not the ineffective-assistance claim. We consider whether the postconviction court erred.

The burden of showing grounds for recusal is on the party seeking recusal. *State v. Haskins*, 573 N.W.2d 39, 44 (Iowa Ct. App. 1997). This burden is substantial, and we will not overturn the trial judge’s decision absent an abuse of discretion. *Taylor v. State*, 632 N.W.2d 891, 893 (Iowa 2001). An abuse of discretion is found when the district court has clearly exercised its discretion on

untenable grounds or acted unreasonably. *Id.* at 894. “A judicial officer is disqualified from acting in a proceeding if the officer ‘has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.’” *Haskins*, 573 N.W.2d at 44. If a reasonable person might question the judge’s impartiality because of such bias or extrajudicial knowledge, the judge should grant the request for recusal. *Id.* “A party must show actual prejudice before a recusal is necessary.” *Id.*

Friedley alleges that the trial judge, as an attorney, had represented one of Friedley’s employees more than thirty years earlier in negotiations against Friedley over that employee’s termination. Friedley asserts that because of this, the trial judge was prejudiced against him. Friedley also alleges that because of the trial judge’s prior knowledge of this area of the law, he was biased against car dealers like Friedley and he acted as a prosecutor rather than a judge during trial.

The trial judge testified at the postconviction hearing that he had “no memory of anything . . . adverse to Herald . . . Friedley.” He testified that he did not remember representing one of Friedley’s former employees in negotiations against Friedley. He further testified that his prior knowledge and experience with this type of case did not prejudice him in any way during this trial.

After reviewing the record, we determine a reasonable person would not conclude the trial judge had any personal bias, prejudice, or extrajudicial knowledge warranting recusal.

B. Aiding and Abetting Instruction. Friedley argues the postconviction court erred in finding it was proper for the trial judge to submit an aiding and abetting instruction that was inconsistent with the State's prosecutorial theory. This court considered this argument on direct appeal and deemed the argument waived because Friedley cited no authority in favor of it. This issue was "not properly raised on direct appeal and may not be litigated in a postconviction relief action unless sufficient reason or cause is shown for not previously raising the claim, and actual prejudice resulted from the claim of error." *Everett v. State*, ___ N.W.2d ___, ___ (Iowa 2010) (quoting *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999)).

C. Ineffective Assistance of Counsel. Friedley alleges his trial counsel was ineffective in failing to allow him to testify at trial and failing to call James Swarbrick as a witness.

To prevail on his ineffective-assistance claims, Friedley must demonstrate counsel failed to perform an essential duty and prejudice resulted. *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). To establish the first prong, Friedley "must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *Id.* To establish the second prong, Friedley must show a reasonable probability exists that, but for counsel's error, the result of the proceeding would have been different. *Id.* Friedley must prove both elements by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

Friedley cannot show counsel breached an essential duty by advising him not to testify. Friedley testified at the postconviction hearing that he discussed with counsel whether he should testify. He asserts he made the decision not to testify after his counsel advised him not to testify, but because he was given misleading advice his decision not to testify was not knowing or intelligent. Friedley's trial counsel testified at the postconviction hearing that he advised Friedley not to testify because the information to which Friedley would have testified was already in the record and he was concerned that if Friedley testified, he would be impeached based on a prior fraud charge. We find the advice provided by Friedley's counsel was within the normal range of competence and was sufficient to allow Friedley to make a well-informed decision whether to testify. We conclude trial counsel did not perform "below the standard demanded of a reasonably competent attorney." *Ledezma*, 626 N.W.2d at 142.

Friedley also alleges counsel was ineffective in failing to call James Swarbrick to testify that Friedley did not direct him to misuse funds and was not aware that money owed to the bank was being used to pay other bills. Friedley presented no evidence at the postconviction hearing to support his assertion that Swarbrick would have provided favorable testimony. Friedley testified at the postconviction hearing that he and Swarbrick "did not get along real well." Friedley has failed to prove by a preponderance of the evidence that the result of the proceeding would have been different had Swarbrick testified. Consequently, he has not demonstrated prejudice. Failure to prove either element of ineffective

assistance is fatal to the claim. *State v. Kingery*, 774 N.W.2d 309, 312 (Iowa Ct. App. 2009).

We affirm the denial of Friedley's application for postconviction relief.

AFFIRMED.